BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANGELICA PORTILLO	)	
Claimant	)	
V.	)	
	)	Docket No. 1,066,522
MOTEL 6	)	
Respondent	)	
AND	)	
	)	
TECHNOLOGY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 23, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

John B. Gariglietti, of Overland Park, Kansas, appeared for the claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from January 20, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's request for workers compensation benefits, finding claimant failed to prove that her fall was work-related and arose out of her employment.

Claimant appeals, arguing the ALJ erred in finding she did not meet with personal injury arising out of and in the course of her employment. Claimant contends her fall was the result of a work risk because she was cleaning the bathroom at the time of the fall. Therefore, claimant requests the Board reverse the ALJ's decision and find the claim compensable.

Respondent contends the ALJ's decision should be affirmed.

The issue on appeal is whether claimant's fall arose out of her employment with respondent or was an idiopathic fall or the result of a risk personal to claimant.

FINDINGS OF FACT

Claimant testified that on June 12, 2013, she fell while cleaning a bathtub at respondent. She acknowledged she had already cleaned the sink and dried out the bathtub when she fell. Claimant testified she is not sure how she fell into the bathtub. She only remembers that she was finished cleaning the bathroom and was going to leave. Claimant thinks she might have slipped on the floor and fell into the bathtub.

During cross examination claimant testified as follows:

Q. So if I understand correctly, you don't know how you fell into the bathtub, correct?

A. Yes.

Q. You had already finished cleaning the bathtub before you fell, correct?

A. Yes.

Q. And after cleaning the bathtub, were you going to leave the bathroom?

A. Yes.

Q. You were done cleaning the bathroom correct?

A. Yes.

Q. You had done all of the different tasks in the bathroom that had to be cleaned already, correct?

A. Yes.

Q. And then somehow, some way that you don't even know, you fell into the tub, correct?

A. Yes.

Q. You weren't cleaning anything when you fell, correct?

A. I was finishing the last thing, I was finishing just to get out of the bathroom.[1]

Claimant didn't know for sure, but assumed that she had slipped on the floor. Later, claimant acknowledged she did not know how she fell into the bathtub. When further questioned on redirect, claimant stated that she was finishing something but "that is what I don't remember."[2] Claimant was further questioned by her attorney as follows:

Q. Do you remember ever telling me that you were cleaning something above your head?

. . .

A. Yes. What I remember is that I was cleaning the wall, cleaning with the cloth.[3]

Later, over respondent's objections claimant stated:

A. What I was finishing with the cloth in my hand was the wall that was in front of me.[4]

She had pain in her back and right hip after the accident. Since the accident her pain has gotten worse and she now has pain in her left leg and left hip. Claimant testified her pain is an 8 out of 10. Claimant was 30 weeks pregnant at the time of the accident. She testified that after the accident she started having contractions and delivered her daughter on June 27 because the doctors were unable to stop the contractions. This delivery was 10 weeks early. After the delivery of her baby, claimant's left leg pain started and she also had pain in her head and right shoulder. Claimant indicated that prior to the June 12, 2013, accident she did not have pain in her back or leg region. She also denied any prior hip injury.

Before the accident claimant's pregnancy was uneventful. However, she never met with an OB-GYN during her pregnancy, so she was not aware of the status of her pregnancy at the time of the fall.

At the time of the accident, claimant had been working for respondent for four months. Her daily duties included cleaning bathtubs. This was the first time she had ever

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[1] P.H. Trans. at 14-15.

[2] *Id.* at 22.

[3] *Id.* at 24.

[4] *Id.* at 25.

fallen into the bathtub. Since the accident, claimant testified there are days she can't walk normally and can't bend over unless she takes her medication.

Marvin Rivera, claimant's husband, indicated he was working with claimant on June 12, 2013, and heard her scream from the bathroom. He found her inside the bathtub. He testified her body was across the bathtub and her eyes were closed like she was almost dead. He testified claimant's head was on the wall and her legs were hanging over the edge of the bathtub. He immediately picked her up and took her over to the bed. He testified claimant was not able to tell him how she fell. He didn't see that she had any cleaning supplies with her or on her person at that time, but he did recall seeing a cloth.

At the request of her attorney, claimant met with George Fluter, M.D., on January 30, 2014, for an examination. Claimant reported pain in her low back, right hip, right leg, numbness on the right side and some symptoms affecting her left hip. Claimant rated her pain as high as 10 out of 10. She described the pain as sharp and severe, with lying down, sitting, standing, walking, bending and twisting making the pain worse. She also reported medication and lying down made her pain better. Claimant reported the pain is constant and tends to be worse in the morning after getting up.

Dr. Fluter examined claimant and diagnosed status post work-related injury, 6/12/13; low back/right hip and lower extremity pain; probable lumbosacral strain; probable soft tissue contusion affecting the back/right hip/right leg; probable sacroiliac joint dysfunction; and probable trochanteric bursitis. He opined, based on the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported work-related injury on June 12, 2013. Dr. Fluter noted that, although pregnancy can be associated with back pain, it is now more than seven months since her baby's birth and, since claimant has continued with back, right hip and right leg pain, that suggests the back pain was not entirely due to pregnancy.

Dr. Fluter opined the prevailing factor for the injury and need for treatment is the work-related injury occurring on June 12, 2013. He recommended temporary restrictions of limited lifting, carrying, pushing and pulling up to 20 pounds occasionally and 10 pounds frequently; restricted bending, stooping, crouching, and twisting to an occasional basis; and restricted squatting, kneeling, crawling and climbing to an occasional basis.

Dr. Fluter recommended medication for claimant's pain symptoms, but her pediatrician should be contacted if claimant is breast feeding to avoid any adverse effects to the baby. He recommended the use of adjuvant medications which could be an anticonvulsant, antidepressant and antispasmodic and/or sleep aid alone or in combination and with consultation of the pediatrician. Imaging studies of the lower back, hips, and pelvis, x-rays of the lumbar spine, bilateral lower extremity electrodiagnostic studies, including EMG of selected muscles of the right leg and paraspinals were recommended. Additionally, a course of physical therapy and home exercise program should be developed

and a TENS unit utilized on a trial basis. Depending on the results of the diagnostic testing and response to conservative treatment, pain management procedures may be indicated to include, but not limited to varying injections. Finally, depending on the results of the diagnostic testing and response to treatment, a neurological and/or orthopedic spine surgical consultation may be indicated.

At respondent's request, claimant met with board certified neurological surgeon Paul S. Stein, M.D., on May 5, 2014. Her chief complaint at the time was pain in the back and right lower extremity. Dr. Stein examined claimant and concluded she was magnifying her symptoms. He recommended x-rays of the lumbar spine with flexion-extension and oblique views; MRI of the lumbar spine; and EMG/NCT of the lumbar paraspinal muscles and lower extremities by a neurologist board certified in electrodiagnostic testing.

Dr. Stein felt it was too early to make a statement regarding causation as a diagnosis was not yet available to show pathology consistent with the complaints. He recommended temporary restrictions of no lifting more than 10 pounds; no repetitive bending or twisting of the lower back; no bending or lifting at the same time; alternate sitting, standing, or walking at least on a 30 minute basis. Upon review of claimant's images and radiology reports, Dr. Stein opined there is no evidence of a permanent impairment to the lower back.

Lumbar spine MRIs and lumbar spine x-rays taken on July 31, 2014, were unremarkable, and read as normal. The EMG/NCT studies showed no evidence of lumbar radiculopathy. Dr. Stein found no need for additional investigation or treatment and recommended no permanent work restrictions.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily,

accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(3) states:

(f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
(3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.
(B) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in

> dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
> (C) The words, "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2013 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant's testimony in this matter is confusing. Initially, she testified she completed the cleaning duties in the bathroom. She was finished with her work and was leaving the bathroom. Then, she testified that she was actually still cleaning, as she was wiping the bathtub wall with a cloth. Either way, claimant was unable to identify how or why she fell. She speculated that she must have slipped, but could not remember.

If her testimony is that she was finished with her work and was leaving, and fell without knowing how or why, then the fall would be idiopathic and non-compensable. If she was, as later claimed, still cleaning the wall of the bathtub, then the fall could be seen as work-related and compensation would be in order.

The ALJ had the opportunity to observe this claimant testify. The Board, on many occasions, has given credence to an ALJ's determination regarding the credibility of a claimant or witness who testifies in the presence of the ALJ. This ALJ did not comment on claimant's credibility. However, she did discuss the fact claimant had admitted she had finished cleaning the bathroom. This testimony was contradicted by claimant's testimony that she was wiping something on the bathtub wall when she fell. The ALJ appears to have determined claimant's admissions about being finished with her work in the bathroom and not knowing how or why she fell was the most credible of claimant's somewhat contradictory testimony. This Board Member finds that determination by the ALJ to be persuasive.

This fall is unexplained. The Kansas legislature has determined idiopathic falls are no longer compensable. Therefore, this unexplained fall does not satisfy the statutory requirements that an accident arise out of and in the course of claimant's employment. The denial of benefits by the ALJ for preliminary hearing purposes is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant's fall was idiopathic. Thus, it does not satisfy the requirement that it must arise out of and in the course of her employment with respondent. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated January 23, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge

[5] K.S.A. 2013 Supp. 44-534a.